Supreme Court, U.S.
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No. 98-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

Teresa L. Cunningham,
Petitioner,

v.

Hamilton County, Ohio,
Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When may an attorney appeal a sanctions order: (i) not until final judgment (the rule in the Sixth and Tenth Circuits); (ii) immediately, *so long as* she is no longer participating in the case (the rule in the Fifth Circuit); (iii) immediately, *so long as* she is no longer participating *and* the appeal is not intertwined with the merits of the case (the rule in Third Circuit); (iv) immediately, *so long as* the sanction is "significant" (the rule in the Eleventh Circuit); or (v) immediately, without conditions (the rule in the Second, Seventh, Eighth, and Ninth Circuits, but rejected by the First, Fourth, and Federal Circuits)?

2. Given that the ruling below announced a new rule of appealability and deprived Petitioner of *any* appeal of the sanctions order against her, should the Sixth Circuit have followed the Tenth Circuit and applied its holding only prospectively?

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, Defendants-Appellees Correctional Medical Systems, Inc., Simon Leis, Sally Remilard, and Joseph Spriggs were parties to the proceedings below.

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No. 98-___

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PETITION FOR A WRIT OF CERTIORARI

Teresa L. Cunningham respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The magistrate judge's opinions granting Respondent's motion for sanctions (Pet. App. 1a-2a) and setting the amount of sanctions (*id.* 3a-9a) are unreported. The district court's opinion affirming (*id.* 10a-18a) is unreported. The opinion of the Sixth Circuit motions panel deferring a decision on that court's jurisdiction over Petitioner's appeal (*id.* 19a-20a) is unreported. The Sixth Circuit's opinion dismissing Petitioner's appeal for lack of jurisdiction (*id.* 21a-37a) is reported at 144

F.3d 418. The Sixth Circuit's order denying rehearing and rehearing *en banc* (*id.* 38a) is unreported.

JURISDICTION

The Sixth Circuit entered its judgment on May 21, 1998. The Sixth Circuit denied rehearing and rehearing *en banc* on August 5, 1998. Petitioner invokes the jurisdiction of this Court under 28 USC 1254(1).

STATUTE INVOLVED

28 USC 1291 provides in relevant part:

> The courts of appeals (other than the Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

STATEMENT

This Petition arises from sanctions imposed by a federal magistrate against Petitioner Teresa L. Cunningham, a solo practitioner in Florence, Kentucky. The Sixth Circuit dismissed Petitioner's interlocutory appeal of the sanctions order for lack of jurisdiction. Pet. App. 37a. Petitioner asks this Court to grant certiorari to resolve the substantial conflict in the circuits over when such a sanction order may be appealed. If the Court reverses the court of appeals' jurisdictional holding, the case then should be remanded to the Sixth Circuit to address the merits of Petitioner's challenge to the sanctions.

1. The bitterly fought suit underlying this Petition arose from the suicide death of a prisoner in the Hamilton County, Ohio jail. On behalf of the prisoner's father, Petitioner filed suit against Respondent Hamilton County and others under 42 USC 1983 alleging that the defendants were culpable in the death of the prisoner because of his known history of suicide attempts. The case was assigned to a magistrate judge, who entered a scheduling order. The defendants then served a

substantial number of interrogatories and requests for documents. Pet. App. 1a-2a.

As the Sixth Circuit recognized, Petitioner's "representation was fraught [with] difficulties even from the earliest days of this litigation." Pet. App. 22a. The defendants filed a series of motions to disqualify Petitioner on the ground that she was a potential witness in the case. In addition, Petitioner's client, the prisoner's father, died. A new administrator eventually was appointed for the estate, but the administrator lived several hours away and did not have a telephone. Pet. C.A. Br. 5, 6. As a result, Petitioner was unable to prepare full and complete responses to a number of the defendants' discovery requests. *Id.* Petitioner informed the defendants of this fact nine days after service of the requests, and some three weeks before the responses were due. Pet. App. 22a.

Counsel for the defendants took an exceptionally aggressive approach in response. The *first* business day after responses were due to the discovery requests, the defendants moved to compel. The magistrate held a hearing on the motion soon thereafter and, despite the death of Petitioner's client, entered an order compelling the production of "full and complete responses" within two days. The magistrate's order also provided that various depositions would take place on July 25 in Cincinnati, Ohio. Pet. App. 2a; Pet. C.A. Br. 14.

Petitioner, who remained unable to secure information from the estate's representative, nonetheless further investigated the facts of the case and responded to the defendants' discovery requests to the best of her abilities. Petitioner also informed Respondent's counsel of her need to depose one witness in advance, and that the witness would only agree to be deposed in Indianapolis, Indiana. Pet. C.A. Br. 14. Petitioner therefore noticed the deposition for that date and location. Pet. App. 4a.

Within three days, counsel for Respondent moved (i) to compel further discovery responses, (ii) for a protective order quashing the notice of deposition, and (iii) for an award of

attorney's fees and costs.[1] The magistrate held a hearing three days later and granted the motions, finding that Petitioner had "effectively violated" the court's earlier order. Pet. App. 2a. The parties then submitted briefs on the attorney's fees issue. Petitioner opposed an award of fees on the grounds that, *inter alia*, she had received the motion for fees and costs only immediately before the hearing, the hearing itself was held almost immediately upon the filing of the defendants' motions in violation of Petitioner's due process rights, the magistrate had provided an insufficient amount of time to prepare discovery responses, and the attorney's fees requested by the defendants were excessive. Pet. App. 7a. The magistrate rejected these objections and held that Respondent was "entitled to recover forthwith" $1494.00 in attorney's fees.[2] The magistrate refused to stay the fee award pending appeal because it perceived Petitioner's conduct to be "egregious." Pet. App. 7a.

2. Petitioner filed objections to the magistrate's order with the district court, which affirmed the sanctions order but did not share the magistrate's view that Petitioner's conduct had been "egregious." Instead, the district court explained that because Petitioner's "conduct clearly necessitated the motions to compel," attorney's fees were awarded under FRCP 37 "which is, essentially, self-executing in the event that a motion to compel is granted." Pet. App. 11a. Similarly, the district court found that amount of the award was not "clearly erroneous or contrary to law." *Id.* In a ruling that was unrelated to the issue of sanctions, the district court also granted the defendants' motion to disqualify Petitioner on the ground that she was a potential witness in the case. Tracking the language of the relevant Ohio rule, the court held that it

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[1]Counsel for the remaining defendants filed a parallel motion the next day. Pet. App. 4a.

[2]The court of appeals' opinion states that Respondent was awarded $1690.50 in fees (Pet. App. 25a), but that amount was reduced to $1494.00 by the magistrate (*id.* 9a). Petitioner separately has settled the magistrate's award of $2928.00 in attorney's fees to another defendant.

was "obvious that [Petitioner] ought to be called as a witness" in the case because she had participated in a conversation that was material to the disputes between the parties. *Id.* 16a. The district court denied the defendants' separate motion for additional sanctions. *Id.* 17a.

3. On Petitioner's appeal of the sanctions order, the defendants moved to dismiss for lack of appellate jurisdiction. A motions panel (Merritt, Contie, and Boggs, J.J.) denied the motion, explaining:

> There is a split among the Circuit Courts of Appeals as to whether an interlocutory award of Rule 11 sanctions against a party's attorney is immediately appealable. *Compare Appeal of Licht & Semonoff*, 796 F.2d 564 (1st Cir. 1986); *Eastern Maico Distributors, Inc. v. Maico-Farhzeugfabrik*, 658 F.2d 944 (3d Cir. 1981); *Click v. Abilene National Bank*, 822 F.2d 544 (5th Cir. 1987); *Howard v. Mail-Well Envelope Co.*, 90 F.3d 433 (10th Cir.), *cert. denied*, 117 S. Ct. 484 (1996); *G.J.B. & Assoc. v. Singleton*, 913 F.2d 824 (10th Cir. 1990); *Sanders Associates, Inc. v. Summagraphics Corp.*, 2 F.3d 394 (Fed.Cir. 1993); *with Morely v. Ciba-Geigy Corp.*, 66 F.3d 21 (2d Cir. 1995); *Sanko S.S. Co. v. Galin*, 835 F.2d 51 (2d Cir. 1987); *Frazier v. Cast*, 771 F.2d 259 (7th Cir. 1985); *Crookham v. Crookham*, 914 F.2d 1027 (8th Cir. 1990); *Aetna Life Ins. Co. v. Alla Medical Services, Inc.*, 855 F.2d 1470 (9th Cir. 1988); *Transamerica Commercial Fin. Corp. v. Banton, Inc.*, 970 F.2d 810 (11th Cir. 1992). In light of this split, the panel assigned to hear this appeal on the merits should consider the jurisdictional issue raised.

Pet. App. 19a-20a.

The parties then submitted merits briefs. In its brief, Respondent "acknowledge[d] that, as this Court noted on page one of its within Order of February 4, 1997, '... There is a split among the Circuit Courts of Appeals as to whether an interlocutory award of Rule 11 sanctions against a party's

attorney is immediately appealable...(numerous citations omitted)...'" Resp. C.A. Br. at 13 (alterations in original). Respondent invited the court to "adopt the position of the Courts of Appeals which have held that such an interlocutory award (as well as an interlocutory award of sanctions levied pursuant to Fed. Civ. R. 37(a)(4)(A)) is *not* immediately appealable." Resp. C.A. Br. at 13-14 (emphasis in original).

In a divided opinion, the Sixth Circuit agreed with Respondent and dismissed Petitioner's appeal for lack of jurisdiction. The court analyzed the issue under the "collateral order" doctrine announced by this Court in *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541 (1949), and reaffirmed in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). To qualify as an appealable "collateral order," an order "must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468.

The very first sentence of Judge Boggs' opinion for the majority below recognized that the "appeal requires us to opine on an issue that has divided our sister circuits." Pet. App. 21a. Specifically,

> Five circuits have held that orders similar to the order at issue in this case (including orders imposing sanctions under Fed. R. Civ. P. 11, orders assessing attorney's fees under Fed. R. Civ. P. 37, and others) are so completely separate from the merits of the underlying action as to be immediately appealable by the attorney subject to the order. Five other circuits have come to the opposite conclusion.

Id. 28a (citations omitted). Moreover, Judge Boggs acknowledged,

> Of the five circuits (First, Third, Fifth, Tenth, and Federal) that refuse to permit a participating attorney to file an immediate appeal under the collateral order doctrine, two [the Third and Fifth] have held nevertheless that an attorney who has withdrawn from representation in the underlying case is entitled to an immediate appeal. By contrast, one of these circuits [the Tenth] has specifically reached the opposite conclusion.

Id. 30a (citations omitted).

Adopting the view of the Tenth Circuit, the majority below concluded that attorney sanctions orders are never appealable before final judgment. The court recognized that "[i]t is beyond dispute that the first *Cohen* factor [that the order finally determine the issue] is satisfied here." Pet. App. 28a. Regarding the second factor, however, the majority concluded that appeals of attorney sanctions orders are not separate from the merits because they require an evaluation of the discovery responses submitted by the attorney. According to the majority, that "process would differ only slightly from an inquiry into the merits." *Id.* 29a.

The majority also rejected the view of the Third and Fifth Circuits that an appeal is permitted so long as the attorney no longer is participating in the case. The majority believed that it would be "strange" to permit an attorney to appeal a sanction immediately when this Court has held that an attorney may not immediately appeal an order of disqualification. Pet. App. 30a (citing *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985)). In addition, the majority foresaw "serious administrative problems" with determining whether an appeal should run from the sanctions order or instead from the date of the attorney's withdrawal or removal from the case. Pet. App. 31a. Finally, the majority announced that it would have allowed Petitioner to appeal from a final judgment in the case, although it recognized that Petitioner had not in fact filed such an appeal and therefore would never have the opportunity to contest the sanctions order against her. *Id.* 28a n.6.

In dissent, Judge Moore would have adopted the view of five circuits that an attorney may immediately appeal a sanctions order. Judge Moore explained that Petitioner's appeal is not, in fact, intertwined with the merits of the underlying lawsuit:

> Cunningham does not contend that her failure to answer the discovery turned on the relevance or scope of the discovery, or that her answers were true where the district court found them to be false. . . . Cunningham raises far different challenges to the sanctions order. Her arguments against the sanctions order are that she did not have enough time to answer the interrogatories, she had to depose Smith in Indianapolis, and she did not receive sufficient notice in order to prepare for the sanctions hearing. None of these arguments involve the substance of the discovery itself.

Pet. App. 34a. Alternatively, Judge Moore believed that the majority's holding should apply only prospectively:

> Because Cunningham did not file a notice of appeal upon the termination of the underlying litigation, retroactive application of the majority decision effectively bars any review of the district court's sanctions imposed upon her. The inequity of this result is patently obvious. When faced with a similar situation, the Tenth Circuit in *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824 (10th Cir. 1990), refused to impose such an unfair result, explaining that ["]the sharp split between the circuit courts as to the *Cohen* doctrine's applicability and the absence of any binding circuit precedent made our holding difficult, if not impossible, to foretell.["]

Pet. App. 37a.

4. The Sixth Circuit subsequently denied rehearing and rehearing *en banc*. This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Frequently Recurring Questions Presented By This Case Have Deeply Divided The Circuits.

The circuits have adopted *six* different rules regarding the circumstances in which an attorney may immediately appeal

the imposition of sanctions. Despite the large number of cases in which the issue arises, this Court has not previously had the opportunity to resolve this now fully mature conflict.[3] Moreover, as is apparent from the large number of appellate cases addressing the question, the issue is important and frequently recurring and therefore deserves the Court's attention.

Separately, on November 9, 1998, counsel in this case will petition for certiorari in a case that presents the Court with the opportunity to resolve another substantial division in the circuits over application of the *Cohen* doctrine: whether a *pro se* Title VII plaintiff may immediately appeal an order refusing to appoint counsel. *Ficken v. Alvarez*, 146 F.3d 978 (D.C. Cir. 1998) (denying interlocutory appeal; acknowledging that "[t]he question has divided our sister circuits. The Third, Fifth, Eighth, and Ninth Circuits allow interlocutory appeals of such orders. The Sixth, Seventh, and Eleventh Circuits read the *Cohen/Coopers & Lybrand* factors to reach the opposite conclusion." (citations omitted)). Our view is that certiorari should be granted in both this case and in *Ficken* in order to resolve the specific conflicts they present, and also to bring greater certainty to the "collateral order" doctrine generally. *See generally Palmer v. City of Chicago*, 806 F.2d 1316 (7th Cir. 1986) (Posner, J.) (suggesting the need to reconceptualize the *Cohen* doctrine).

1. Four circuits apply a *per se* rule permitting appeals. The Second, Seventh, Eighth, and Ninth Circuits all have held conclusively that an attorney may immediately appeal the imposition of sanctions. *See Crookham v. Crookham*, 914 F.2d 1027, 1029 n.4 (8th Cir. 1990) ("Although not raised by

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[3]The issue was presented by the Petition for Certiorari in No. 97-323, *Ted Lapidus, S.A. v. Vann* (cited *infra* n.4), but that case was mooted during the pendency of the Petition. *See* BIO, No. 97-323. The issue was not presented by the Petitions in (i) *Serritella v. Markum*, 119 F.3d 506 (7th Cir.), *cert. denied sub nom.* No. 97-732, *Steagall v. U.S. District Court* (cited *infra* n.6), (ii) *Howard v. Mail-Well Envel. Co.*, 90 F.3d 433 (10th Cir.), *cert. denied sub nom.* No. 96-571, *Smith v. Mail-Well Envel. Co.* (cited *supra* at 5), (iii) or No. 95-808, *Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1130 (9th Cir.) (cited *infra* n.5).

appellees, we note in general that Rule 11 sanctions against present counsel to a party are immediately appealable as a final decision under § 1291 and under the *Cohen* collateral order doctrine." (citations omitted)); *Hoar v. Sara Lee Corp.*, 882 F.2d 682, 685 (2d Cir. 1989) ("[A] non-party attorney may bring an interlocutory appeal of a Rule 37 sanction pursuant to the *Cohen* exception.")[4]; *Aetna Life Ins. Co. v. Alla Med. Servs.*, 855 F.2d 1470, 1472 (9th Cir. 1988) ("Aetna acknowledges that this court has previously found orders imposing sanctions against non-party attorneys to be immediately appealable.")[5]; *Frazier v. Cast*, 771 F.2d 259, 262 (7th Cir. 1985).[6]

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[4]*See also Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 95 (2d Cir.) (acknowledging "a number of decisions in this circuit broadly authorizing a non-party attorney to bring an immediate appeal from an award of sanctions"), *cert. denied*, 118 S. Ct. 337 (1997); *Satcorp Int'l Group v. China Nat'l Silk Import & Export Corp.*, 101 F.3d 3, 5 (2d Cir. 1996); *MacDraw, Inc. v. CIT Group Equipment Financing, Inc.*, 73 F.3d 1253, 1258 n.4 (2d Cir. 1996); *Morley v. Ciba-Geigy Corp.*, 66 F.3d 21, 22 n.1 (2d Cir. 1995) ("A Rule 11 order against an attorney, though not a final judgment, is appealable under the collateral order doctrine."); *Discon, Inc. v. NYNEX Corp.*, 4 F.3d 130, 132 (2d Cir. 1993) ("[A]s a final collateral order under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), a sanction award may be appealed separately from the merits of the underlying action."); *Sanko Steamship Co. v. Galin*, 835 F.2d 51, 53 (2d Cir. 1987); *Cheng v. GAF Corp.*, 713 F.2d 886 (2d Cir. 1983).

[5]*See also Hill v. Macmillan/McGraw-Hill Sch. Co.*, 102 F.3d 422, 424 (9th Cir. 1996) ("We ha[ve] previously held that [a sanctions] order which imposes liability only on a non-party is immediately appealable as a final order, whereas an order that runs only to the party is not."); *Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995) ("An order imposing Rule 11 sanctions upon counsel, a nonparty, is final and appealable by the attorney sanctioned upon the imposition of the sanction."), *cert. denied*, 516 U.S. 1145 (1996); *Telluride Mgmt. Solutions v. Telluride Invest. Group*, 55 F.3d 463, 465 (9th Cir. 1995) ("An order compelling a nonparty to pay attorney's fees and costs is a final order reviewable under 28 U.S.C. § 1291."); *Mark Indus. v. Sea Captain's Choice*, 50 F.3d 730, 731 (9th Cir. 1995); *Bishop v. Bechtel Power Corp.*, 905 F.2d 1272, 1275 (9th Cir. 1990) ("[A]n order imposing sanctions solely on a nonparty falls within the collateral order exception to the final judgment rule and thus is immediately appealable."); *Riverhead Sav. Bank v. National Mortgage Equity Corp.*, 893 F.2d 1109, 1113 (9th Cir. 1990) ("A sanctions order imposed solely on a non-party to pay attorney's fees and costs falls within the collateral order exception to the finality rule and is appealable immediately as a final order."); *Rachel v. Banana Republic*, 831 F.2d 1503, 1508 n.5 (9th Cir. 1987) ("An order imposing sanctions upon counsel, a nonparty, is final and appealable by the person sanctioned upon

These precedents are deeply embedded, as is apparent from the cases cited in the footnotes to the previous paragraph. In fact, these courts have continued to apply their precedents while recognizing the conflicting views of other circuits. Thus, the Second Circuit recently "recognize[d] that some other circuits do not agree and have denied an immediate appeal in this situation principally because sanctioned counsel would have a right to appeal later and because the sanction order 'may

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imposition of the sanction."); *Unioil v. E.F. Hutton & Co.*, 809 F.2d 548, 552 (9th Cir. 1986), *cert. denied*, 484 U.S. 822, 823 (1987); *Optyl Eyewear Fashion Int'l Corp. v. Style Companies*, 760 F.2d 1045, 1047 n.1 (9th Cir. 1985) ("An order imposing a sanction upon counsel, a nonparty in the underlying action, is final and appealable by the person sanctioned, when the sanction is imposed."); *In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation*, 747 F.2d 1303, 1305 (9th Cir. 1984) ("Ordinarily, a nonparty may appeal either a contempt order or a discovery sanction before final judgment in the underlying action if the order or sanction is directed at him."), *cert. denied*, 471 U.S. 1100 (1985); *Kordich v. Marine Clerks Ass'n*, 715 F.2d 1392, 1392 (9th Cir. 1983) ("Appellant contends that an order compelling a non-party to pay attorneys fees and costs is immediately appealable as a final order. We agree."); *United States v. Blodgett*, 709 F.2d 608, 610 (9th Cir. 1983); *Mesirow v. Pepperidge Farm*, 703 F.2d 339, 345 (9th Cir.) ("An order imposing a sanction upon counsel, a nonparty, is final and appealable by the person sanctioned, when imposed."), *cert. denied*, 464 U.S. 820 (1983); *Liew v. Breen*, 640 F.2d 1046, 1048 (9th Cir. 1981) ("An order compelling a non-party such as Breen to pay attorney's fees and expenses is a final order reviewable under 28 U.S.C. § 1291 (1976)."); *David v. Hooker*, 560 F.2d 412, 417 (9th Cir. 1977) ("Thus, the order requiring Haffkine to pay the attorney's fees and expenses [under Rule 37] incurred by the failure to answer is appealable as it is final as to a nonparty.").

[6]*See also Serritella v. Markum*, 119 F.3d 506, 512 (7th Cir.) ("In this Circuit, an order imposing Rule 11 sanctions against an attorney for a party who has participated in pending litigation is immediately appealable. The Second, Eighth, Ninth and Eleventh Circuits are in accord." (citations omitted)), *cert. denied*, 118 S. Ct. 566 (1997); *Cleveland Hair Clinic v. Puig*, 104 F.3d 123, 125 (7th Cir. 1997) ("[A]n attorney no longer involved in the litigation may appeal immediately from an award of sanctions, because he will not be able to appeal from the order terminating the litigation on the merits."); *Kotsilieris v. Chalmers*, 966 F.2d 1181, 1183 (7th Cir. 1992); *Cassidy v. Cassidy*, 950 F.2d 381, 383 (7th Cir. 1991) ("We have used *Cohen* to assume jurisdiction of appeals from orders awarding attorneys' fees and other sanctions, observing that the award is independent of the merits and the transfer of funds poses a risk that a party prevailing at the end of the case will be unable to recoup the money."); *John v. Barron*, 897 F.2d 1387, 1390 (7th Cir.), *cert. denied*, 498 U.S. 821 (1990); *Knorr Brake Corp. v. Harbil*, 738 F.2d 223, 226 (7th Cir. 1984) ("Other circuits have held that an order assessing fees under section 1927 is appealable when entered. We agree." (citations omitted)).

not be entirely separable from the underlying case.'" *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 95 (2d Cir.), *cert. denied*, 118 S. Ct. 337 (1997). Judge Easterbrook similarly has recognized that the Seventh Circuit's rule "that an attorney no longer involved in the litigation may appeal immediately from an award of sanctions, because he will not be able to appeal from the order terminating the litigation on the merits . . . . although questioned and disapproved in other circuits remains the law of this one." *Cleveland Hair Clinic v. Puig*, 104 F.3d 123, 125 (7th Cir. 1997). A panel of the Ninth Circuit has made the same point even more forcefully:

> [Appellee] argues that we should reexamine our approach given the increasing frequency with which sanctions are being imposed, and in light of Supreme Court authority narrowing the reach of the collateral order doctrine. Our prior holding that sanction orders issued solely against non-party attorneys are immediately appealable is controlling absent overruling by the Supreme Court or an *en banc* panel. We note that our holding that Rule 11 sanctions against non-party attorneys are immediately appealable has been reaffirmed subsequent to the Supreme Court's most recent pronouncement in 1985 of the appealability of rulings on motions to disqualify attorneys. Absent overruling, we must follow the law of this Circuit.

Aetna Life Ins. Co. v. Alla Med. Servs., 855 F.2d 1470, 1472-73 (9th Cir. 1988).

2. The Eleventh Circuit permits immediate appeals of "significant" sanctions. The Eleventh Circuit has adopted virtually the same rule as the Second, Seventh, Eighth, and Ninth Circuits, except that the Eleventh Circuit has specified that the sanction in question must be "significant" and not "nominal." *Ortho Pharm. Corp. v. Sona Distribs.*, 847 F.2d 1512, 1515-16 (11th Cir. 1988) ("When a Rule 11 sanction[] directs a non-party (jointly and severally with parties to the action or alone) to pay immediately–that is, before entry of

financial judgment–significant attorneys fees and costs, this court has jurisdiction to hear immediate appeal of the sanction order."); *see also DeSisto College v. Line*, 888 F.2d 755, 762 n.12 (11th Cir. 1989) (reiterating that "the size of the sanction was an important factor" in permitting an appeal). The rationale of the Eleventh Circuit is that "[w]hile the issue may be separable and discrete from the central controversy of the case, the small size of the sanction will not meet the 'significant issue' component of the second criterion under *Cohen*." *Ortho Pharm. Corp.*, 847 F.2d at 1516. The Eleventh Circuit's precedents permitting an immediate appeal are similarly deeply embedded,[7] and that court has recognized that other circuits apply a contrary rule. *Transamerica Commercial Fin. Corp. v. Banton, Inc.*, 970 F.2d 810, 814 n.3 (11th Cir. 1992) ("Some circuits even prohibit immediate appeals by non-parties." (citing *G.J.B.*, *supra* (10th Cir.); *Click*, *supra* (5th Cir.); *Licht & Semenoff*, *supra* (1st Cir.)); *Ortho Pharm. Corp.*, 847 F.2d at 1516 ("Courts that have confronted the question of whether a non-party may take immediate appeal of a sanction order have parted ways in their application of the third *Cohen* criterion to this sort of situation.").

3. The Fifth Circuit permits immediate appeals if the attorney is no longer participating in the case. The Fifth Circuit held in *Click v. Abilene Nat'l Bank*, 822 F.2d 544 (5th Cir. 1987), that an attorney generally may *not* immediately appeal the imposition of sanctions. *See also Shaffer v. Iron Cloud, Inc.*, 865 F.2d 690, 691 (5th Cir. 1989). That court has recognized an exception, however, when (as in this case) the

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[7] *See also Peterson v. BMI Refractories*, 124 F.3d 1386, 1390 (11th Cir. 1997) ("We have jurisdiction under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), to review the district court's imposition of sanctions against plaintiffs' counsel."); *Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber*, 890 F.2d 371, 378 (11th Cir. 1989) ("Ruden Barnett correctly asserts that we have applied the collateral order doctrine to cases in which a non-party was sanctioned by the trial court in a non-final order."); *Robinson v. Tanner*, 798 F.2d 1378, 1381 (11th Cir. 1986) ("By following this procedure, the courts have found discovery sanction orders immediately appealable where . . . the sanction was against a non-party who might not be able to obtain review from a final judgment . . . ." (citations omitted)), *cert. denied*, 481 U.S. 1039 (1987).

attorney no longer is participating in the district court proceedings. "[W]e believe that where an order assesses sanctions against an attorney who has withdrawn from representation at the time of the appeal, and immediate appeal of the sanctions order will not impede the progress of the underlying litigation, an exception to the general policy set out in *Click* is warranted." *Markwell v. County of Bexar*, 878 F.2d 889, 901 (5th Cir. 1989). The Fifth Circuit has applied that rule in subsequent cases,[8] and has recognized that

> [t]here is disagreement in the circuits . . . . The First, Third and Federal Circuits also hold that an appeal of a sanction order issued against an attorney for a party is not an appealable collateral order under *Cohen*. However, the Second, Seventh, Eighth, and Eleventh Circuits hold that an attorney for a party may immediately appeal a sanction order pursuant to *Cohen*.

Chaves v. M/V Medina Star, 47 F.3d 153, 155 n.7 (5th Cir. 1995) (citations omitted).

4. The Third Circuit permits immediate appeals if the attorney is no longer participating in the case *and* the appeal is not intertwined with the merits. Like the Fifth Circuit, the Third Circuit does not permit immediate appeals unless the attorney no longer is participating in the case. *Compare Eastern Maico Distribs. v. Maico-Fahrzeugfabrik, G.m.b.H.*, 658 F.2d 944 (3d Cir. 1981) (no appeal permitted) *with Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535 (3d Cir. 1985) (appeal permitted where counsel had

[8] *Walker v. Mesquite, Tex.*, 129 F.3d 831, 832 (5th Cir. 1997) ("The record reflects that Peebles no longer is counsel in this action . . . . Consequently, Peebles need not defer until the end of this litigation to appeal the district court's finding that he abused his duty of candor."); *Chaves v. M/V Medina Star*, 47 F.3d 153, 156 (5th Cir. 1995) ("We believe that the facts of the instant case fall within the exception set out in *Markwell*. While attorney Spears has not withdrawn from representation of his clients, his clients have settled and have been voluntarily dismissed from the underlying action.").

withdrawn).[9] But the Third Circuit has applied a further refinement: that court conducts a "case-by-case" analysis into whether the appeal "touch[es] on the merits of the underlying case." *In re Tutu Wells Contamination Litigation*, 120 F.3d 368, 378 n.7 (3d Cir. 1997). Thus, although "sanctions for violations of discovery orders are *usually* considered interlocutory and not immediately appealable" because of their fact-specific nature, *Eavensen, supra*, 775 F.2d at 538 n.6 (emphasis added), the Third Circuit has twice permitted non-participating attorneys to bring due process challenges to discovery sanctions, *In re Tutu Wells, supra*, 120 F.3d 368; *Martin v. Brown*, 63 F.3d 1252, 1261 n.11 (3d Cir. 1995) ("As in *Eavenson*, 'we do not now adopt a rule that would allow immediate appellate review of any sanction order imposed upon counsel, whether counsel has withdrawn from the case or not.'").

5. Three circuits generally do not permit immediate appeals, but have not addressed appeals by attorneys that are no longer participating in the case. The First, Fourth, and Federal Circuits have refused to permit immediate appeals of sanction orders, but have not been presented with a case in which the appealing attorney no longer was participating in the case. *Sanders Assocs. v. Summagraphics Corp.*, 2 F.3d 394 (Fed. Cir. 1993)[10]; *In re Licht & Semonoff*, 796 F.2d 564, 572 (1st Cir. 1986) (not permitting appeal, but "express[ing] no opinion as to the appealability of sanctions against a nonparty or an attorney no longer litigating the case"); *In re Underwriters at Lloyd's & British Ins. Cos.*, 666 F.2d 55, 57 (4th Cir. 1981) (citing *Wheeler v. Anchor Continental, Inc.*,

[9] *See also Glaser v. Cincinnati Milacron*, 808 F.2d 285, 286 (3d Cir. 1986) ("Because appellants are no longer counsel for the plaintiff, we have appellate jurisdiction under *Eavenson* . . . ."; appeal permitted over whether legal theory set forth in pleading was filed in good faith).

[10] *See also View Engineering v. Robotic Vision Sys.*, 115 F.3d 962, 964 (Fed. Cir. 1997) ("[A] sanction against an attorney is not reviewable until final judgment is entered on the underlying action, even though the amount of that sanction has already been determined.").

622 F.2d 94 (4th Cir. 1980)). For its part, the Federal Circuit has recognized the "disagreement among the circuits on whether an attorney for a party may appeal a sanction order issued against the attorney alone or against the attorney and the party together." *Sanders*, 2 F.3d at 395-96 (collecting cases).

6. The Tenth Circuit does not permit immediate appeals *even if* the attorney is no longer participating in the case, but has applied that rule only prospectively. The Tenth Circuit does not permit immediate appeals of sanction orders, without regard to whether the attorney remains in the case. Thus, that court has squarely "disagree[d] with the rationales underlying the decisions of the Third, Fifth and Seventh Circuits holding a sanction order against an attorney who no longer represents a party in the litigation is appealable under the collateral order doctrine." *Howard v. Mail-Well Envel. Co.*, 90 F.3d 433, 436 (10th Cir. 1996).[11] But the Tenth Circuit applied its rule only prospectively. In the first case presenting the question, the court recognized that the attorney before it had filed an interlocutory appeal from the sanctions order but had not appealed from the final judgment subsequently entered by the district court. As a result, retroactive application of the court's ruling "would be inequitable" because it would leave the attorney "remediless for the time has passed to file a new notice of appeal from the final judgment" and because "[t]he sharp split between the circuit courts as to the *Cohen* doctrine's applicability and the absence of any binding circuit precedent made our holding difficult, if not impossible to foretell." *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824, 829-30 (10th Cir. 1990). Moreover, like virtually every court of appeals, the Tenth Circuit has recognized that

> [d]espite their general agreement on the interlocutory nature of a sanction order against counsel of record, the circuit courts are sharply

[11] *See also Law v. NCAA*, 134 F.3d 1025, 1029 (10th Cir. 1998) ("As a general rule, an order imposing sanctions is not immediately appealable."); *D&H Marketers v. Freedom Oil & Gas*, 744 F.2d 1443 (10th Cir. 1984) (en banc).

> divided on the question of whether such an order is immediately appealable as an exception to the 'final decision' rule under the collateral order doctrine first announced in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) . . . .

Id. at 827.

7. The Sixth Circuit in this case refused to permit immediate appeals even though Petitioner no longer is participating in the case, and furthermore applied its ruling retroactively. The Sixth Circuit's decision conflicts with *every* court of appeals that has addressed facts that parallel this case. The Sixth Circuit expressly adopted the view of the First, Third, Fourth, Fifth, Tenth, and Federal Circuits that attorney sanction orders generally are not immediately appealable, and rejected the contrary view of the Second, Seventh, Eighth, and Ninth Circuits. Pet. App. 28a-30a. In this respect, the decision below also conflicts with the Eleventh Circuit's unique holding that only "significant" sanctions are appealable, because the $1400 sanction in this case is "significant" and not "nominal." The decision below further refuses to follow not just those five circuits that generally permit immediate appeals of sanction orders but also the Third and Fifth Circuits, which permit appeals so long as the attorney has withdrawn or been removed; only the Tenth Circuit agrees that no appeal is permissible in this circumstance. Pet. App. 30a. Finally, the decision below openly conflicts with even the Tenth Circuit, which applied its appealability holding only prospectively in order to avoid depriving the attorney before it of any opportunity to appeal.

This Court ought to grant certiorari in order to resolve these important and recurring conflicts in the circuits.

II. The Decision Below Is Erroneous.

1. Attorney sanctions awards are immediately appealable collateral orders. Certiorari also is warranted because the decision below errs in its application of the collateral order

doctrine. To qualify as a final collateral order, an order "must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). As to the first element, there is no question that the sanction order in this case finally determined the issue, and Respondent has never contended otherwise.

As to the second element, the award of sanctions against an attorney is completely separate from the merits of a case. A trial judge's decision to sanction an attorney depends upon the behavior of the attorney and not upon the merits of the parties' claims. Thus, as Judge Moore noted in dissent, "None of [Petitioner's] arguments against the sanctions order involve the substance of the discovery itself. . . . Consequently . . . resolution of [Petitioner's] . . . objections to the sanctions order would not compel us to address the merits of the underlying action." Pet. App. 34a. Nor would such an appeal delay the litigation (which can proceed without interruption) or result in unnecessary or duplicative appeals. Unlike attorney-disqualification orders, which may or may not ultimately be appealed depending on which party finally prevails, sanctions orders are unaffected by the final disposition of the case and therefore inevitably will be appealed.[12]

In a closely analogous circumstance, this Court has held that nonparty civil contempt sanctions are separable from the merits and thus immediately appealable. *See United States Catholic Conference v. Abortion Rights Mobilization*, 487 U.S. 72, 76 (1988) ("The right of a nonparty to appeal an adjudication of contempt cannot be questioned. The order finding a nonparty witness in contempt is appealable notwithstanding the absence of a final judgment in the

[12]Indeed, an appeal of the sanction could be rendered unnecessary only by a settlement agreement that also includes a resolution of the sanction. This possibility, as discussed below, creates a potential conflict of interest between attorney and client, which would be obviated by allowing an immediate appeal.

underlying action."); *United States v. Ryan*, 402 U.S. 530 (1971); *Cobbledick v. United States*, 309 U.S. 323, 328 (1940). Indeed, the *Ryan* decision specifically instructs that the proper remedy for a nonparty aggrieved by a discovery order is to disobey the order, incur contempt citations, and then immediately appeal the contempt citation. 402 U.S. at 532. Sanctions and contempt citations are functionally indistinguishable in that both seek to deter and punish the violation of an obligation owed to the court as well as to compensate aggrieved parties. *Accord Hutto v. Finney*, 437 U.S. 678, 692 n.17 (1978) (noting the compensatory and coercive functions of civil contempt orders); *Cheng v. GAF Corp.*, 713 F.2d at 890 (citing Advisory Committee Note of 1990 to Amended Rule 37)).

As for the third *Cohen* factor, sanctions awards against attorneys are effectively unreviewable on appeal. In cases in which the attorney's client wins or settles the case, several circuits have held that the attorney may not appeal from any judgment entered in the case.[13] *E.g.*, *Cheng v. GAF Corp.*, 713 F.2d at 890 (2d Cir.); *Frazier v. Cast*, 771 F.2d at 261 (7th Cir.). Courts have, in fact, gone so far as to hold that, as with a civil contempt order, a non-party attorney is completely precluded from contesting a sanction on appeal from a final judgment. *E.g.*, *Hoar, Inc. v. Sara Lee, Inc.*, 882 F.2d at 685 (2d Cir.); *David v. Hooker, Ltd.*, 560 F.2d at 417 (9th Cir.). Moreover, the sanctions award may be effectively unreviewable on appeal for the simple reason that the party who obtained the award may be insolvent by the time of an appeal after final judgment. For these reasons, the decision below gives a sanctioned attorney a substantial incentive to not settle or to manipulate the settlement to resolve the sanction, and thereby risks causing substantial harm to the attorney-client relationship.

[13] Although many cases do not settle or result in a favorable final judgment for the sanctioned attorney's client, the attorney cannot know at the time of the sanction how the case will conclude. The attorney therefore has no option but to appeal immediately in order to preserve her opportunity to appeal.

2. Attorney sanctions awards are immediately appealable when the sanctioned attorney no longer is participating in the case. Even if the Sixth Circuit were correct that sanctions orders are not *per se* immediately appealable, it erred in holding that no appeal is permitted even when (as here) the attorney no longer is involved in the case. An appeal by a non-participating attorney is indistinguishable from an appeal by a non-party who has been sanctioned for contempt. Such an appeal by definition cannot interfere with any ongoing district court proceedings. There is, moreover, an even greater concern that the non-participating attorney would lack standing to bring an appeal at the end of the case. Finally, an attorney in such a position even by the exercise of reasonable diligence may not discover that the litigation has terminated (as when the case settles confidentially or lies dormant on the district court's docket for a lengthy period of time) and therefore may miss her opportunity to appeal.

Contrary to the analysis of the majority below (Pet. App. 30a), attorney sanctions cannot be analogized to orders disqualifying counsel, which are not immediately appealable. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985). Appeals of disqualification orders directly affect the ongoing district court litigation: "When an appellate court accepts jurisdiction of an order disqualifying counsel, the practical effect is to delay proceedings on the merits until the appeal is decided." *Id.* at 434. In addition, a party whose counsel has been disqualified will always have an effective opportunity for review. *Id.* at 438. Neither of those considerations holds true for immediate appeals of sanctions orders.

Nor was the majority below correct that a rule permitting appeals by non-participating attorneys would result in "administrative difficulties" in determining when the attorney's time for filing an appeal begins. Pet. App. 31a. Because such a rule of appealability would depend on both (i) the entry of a

sanctions order and (ii) the attorney's withdrawal or removal, the filing period should run from the later of those two dates.[14]

3. Even if the court of appeals correctly held that attorney sanctions are not immediately appealable, it erred in applying its holding retroactively. This Court held in *Chevron Oil v. Huson*, 404 U.S. 97, 106-07 (1971), that the determination whether a court ruling applies retroactively turns on whether (1) the decision establishes a new principle of law the resolution of which was not clearly foreshadowed, (2) the decision's purpose would be retarded by its retroactive application, and (3) the decision's retroactive application would produce inequitable results. In this case, the Sixth Circuit erred in applying its decision retroactively. The decision below was not foreshadowed by prior Sixth Circuit precedent and openly conflicts with decisions of seven circuits. Moreover, this Court's civil contempt jurisprudence strongly suggested that Petitioner could immediately appeal the sanctions order. Petitioner therefore understandably did not appeal from the district court's entry of final judgment, and as a result has been deprived of *any* opportunity to appeal. As the Tenth Circuit recognized in an indistinguishable case, "the small benefit [gained] by applying [such a] holding retroactively does not outweigh the inequity which would result from such a determination." *G.J.B. & Associates, Inc. v. Singleton*, 913 F.2d 824, 830 (10th Cir. 1990).

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[14]In this case, those events occurred on the same day. Pet. App. 10a.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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November 3, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DARWIN LEE STARCHER,
Plaintiff

vs

Case No. C-1-95-815
(Beckwith, J.)

MEDICAL CORRECTIONS
SYSTEMS, INC. et. al
Defendants

ORDER

This matter is before the Court on plaintiff Darwin Lee Starcher's motion to compel and for sanctions (Doc. 28), defendant Hamilton County, Ohio's second motion for protective order and for sanctions (Doc. 30), defendants Medical Correction Systems (CMS), Remilard, and Spriggs' motions for protective order and to enforce (Docs. 31, 32) and defendants' joint motion to quash (Doc. 34). This Court held a hearing on these motions on July 19, 1996. After reviewing the record and hearing arguments by the parties, the Court hereby ORDERS the following:

1) that the plaintiff's motion to compel and for sanction (Doc. 28) is DENIED;
2) that defendant Hamilton County's motion for protective order prohibiting the deposition of Rex Smith noticed for July 22, 1996 in Indianapolis, Indiana (Doc. 30) is GRANTED such that the deposition will not go forward;
3) that defendants CMS, Spriggs, and Remilard's motion for protective order to prohibit Rex Smith's deposition notice for July 22, 1996 in Indianapolis, Indiana (Doc. 31) is GRANTED

and their motion for protective order to prohibit the depositions of Spriggs and Remilard noticed for July 25, 1996 is GRANTED;

4) that defendants CMS, Spriggs, and Remilard's motion to compel full and complete responses to defendants' first set of interrogatories and request for documents (Doc. 32) is GRANTED; and
5) that defendants' joint motion to quash the subpoena requiring Rex Smith to appear for deposition on July 22, 1996 in Indianapolis, Indiana (Doc. 34) is GRANTED.

Plaintiff is FURTHER ORDERED to serve supplementary answers to defendants' first set of interrogatories and request for documents WITHIN TEN DAYS of the date of the hearing on this matter.

The depositions of defendants Remilard and Spriggs shall go forward no sooner than THIRTEEN days after plaintiff has served defendants with the above-ordered supplementary response. The depositions of defendants Spriggs and Remilard are to be scheduled by agreement of the parties, or if no agreement can be reached, upon proper notice by counsel for plaintiff to counsel for defendants as required under the Federal Rules of Civil Procedure. The deposition of Rex Smith may go forward on a date and in a place agreed upon by the parties, or if no agreement can be reached, upon proper notice by counsel for plaintiff to counsel for defendants as required under the Federal Rules of Civil Procedure.

Because the Court finds that plaintiff has effectively violated this Court's order of July 12, 1996, defendants' motions for sanctions are GRANTED. Within THIRTY DAYS counsel for defendants are to submit to the Court appropriate statements indicating their reasonable fees and expenses for their court appearance on these motions and their preparation for today's hearing. Defendants shall serve copies of these statements on plaintiff. The Court will consider these statements before ruling upon the sanctions to be imposed.

SO ORDERED.

Date: _____

James F. Cook
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

DARWIN LEE STARCHER,
Plaintiff

vs Case No. C-1-95-815

MEDICAL CORRECTIONS
SYSTEMS, INC. et. al
Defendants J. Beckwith

ORDER

This Order addresses the imposition of sanctions in the form of reasonable expenses, including attorney's fees, to be imposed against plaintiffs' counsel in regard to the hearing that was conducted before the undersigned on July 19, 1996. In this ruling the Court will determine the amount of such expenses to which defendants are entitled. A review of the record leading up to the July 19th hearing is appropriate.

An informal discovery conference was held by the undersigned with all counsel on July 10, 1996 and resulted in the entry of a formal order dated July 11, 1996 and entered on July 12, 1996. (Doc. 26). This order directed *inter alia*, that the plaintiff make full and complete responses to defendants' First Set of Interrogatories and Document Requests by 4:00 p.m. on July 12, 1996; that certain depositions, including that of Rex Smith, be taken on July 25, 1996; and that the depositions of defendants Remillard and Spriggs go forward on July 25, 1996 only if plaintiff had made full and complete responses to defendants' First Set of Interrogatories and Document Requests by 4:00 p.m. on July 12, 1996. It should be noted that

plaintiff's counsel was advised of and understood the July 12th , 4:00 p.m. deadline at the conference on July 10th.

On July 16, 1996, plaintiff filed a Motion to Compel Defendants Spriggs and Remillard to Appear for Depositions on July 25, 1996, to Depose Rex Smith in Indianapolis, Indiana and for Sanctions. (Doc. 28). It is argued int his motion that plaintiff complied with the July 12th, 4:00 p.m. deadline on responses to the defendants' Interrogatories and Requests for Production of Documents, yet defendants Spriggs and Remillard, by their attorney, have stated that they will not appear for their depositions; and that Rex Smith was located in Indianapolis and that he would be unavailable for his deposition in Cincinnati on July 25th, that his deposition and, therefore, been resche[illegible]ed by plaintiff's counsel for July 22nd in Indianapolis and a subpoe[illegible]ssued by plaintiff's counsel to that effect. Sanctions against defe[illegible]nts Spriggs and Remillard were sought for their alleged failure to obey the July 12th order.

A Notice to Take Deposition was issued by plaintiff's counsel on July 15th noticing the deposition of Rex smith in Indianapolis on July 22nd. (Doc. 29).

On July 16, 1996 the County Defendants filed a Second Motion for Protective Order and for Expenses, Fees and Sanctions. (Doc. 30). The grounds for the motion are that the action of plaintiff's counsel in scheduling the Smith deposition in Indianapolis on July 22nd was a violation of the Court's July 12th order which directed that the deposition be taken on July 25th, that it was the clear understanding of all counsel that the deposition would be taken on that date in plaintiff's counsel's office in Cincinnati. Also, it was alleged that the subpoena issued to Smith was not valid in that it was issued out of this court rather than the U.S. District court in Indianapolis. Expenses including attorney's fees were requested pursuant to F.R. Civ. P. 26(c) and 37(a)(4).

The CMS, Remillard and Spriggs Defendants also filed a Motion for Protective Order and Sanctions. (Doc. 31). This motion was filed on July 17, 1996 and sought a protective order prohibiting the taking of the Smith deposition on July 22nd and the taking of the Remillard and Spriggs depositions on July 25th. The grounds for the motion are that the unilateral action of plaintiff's counsel in noticing the Smith deposition for July 22nd in Indianapolis violated the Court's July 12th order, and that plaintiff's responses to the First Set of Interrogatories and Document Requests were not full and

complete in violation of the July 12th order so that the depositions of Remillard and Sprigs should not go forward on July 25th. The legal expenses and costs of these defendants incurred in bringing the motion were sought.

Also on July 17, 1996 the CMS Defendants filed a Motion to Enforce Order and for Sanctions. (Doc. 32). By this motion these defendants asked for an order compelling compliance with the July 12th order relating to plaintiff's responses to the defendants' Interrogatories and Document Requests and for reasonable expenses, including attorneys' fees in obtaining such order.

All defendants filed a joint motion on July 17, 1996 to quash the subpoena issued to Rex Smith for his deposition on July 22nd in Indianapolis (doc. 34), basically on the same grounds as set forth in the other motions filed in connection therewith.

The defendants, respectively, filed responses to the plaintiff's Motion to Compel which is noted above. (doc. 35 and 36).

In view of the apparent urgency of these motions the Court scheduled them for hearing on July 19, 1996 and did conduct such hearing on that date. All counsel were present and were given the opportunity to argue the various matters raised by the motions. A written transcript of the hearing has been prepared and filed in the record. (Doc. 47).

The undersigned made the following rulings on the motions; the plaintiff's Motion to Compel was denied; the motion of the County Defendants for a protective order prohibiting the deposition of Rex Smith at Indianapolis on July 22nd was granted; the motion of the CMS Defendants was also granted in that respect and prohibiting the taking of the depositions of defendants Remillard and Sprigs on July 25th; the motion of the CMS Defendants and Remillard and Spriggs requiring plaintiff to serve full and complete answers to the defendants' First Set of Interrogatories and Request for Documents was granted as was the defendants' joint motion to quash the Smith subpoena.

Further directives for the serving of supplemental responses by plaintiff to the interrogatories and document requests were included in the order, as well as for the taking of the depositions of defendants Remillard and Spriggs and the witness Rex Smith.

The Court concluded that plaintiff's counsel had not complied with the July 125th order, but had violated same. The motions of the defendants for protective order and sanctions were granted and

counsel were directed to submit to the Court their respective statements of charges and costs that were necessitated by filing their motions and attending the hearing. (Doc. 38 and 47).

The authority for the action taken by the Court is found in Rule 26(c), F.R. Civ. P., and Rule 37(a)(4), F.R. Civ. P. The defendants; motions for protective orders were granted after a hearing was conducted; it was determined that the conduct of plaintiff's counsel had necessitated the motions; it is apparent from the motions and the record of the hearing that defendants counsel made a good faith effort to resolve the matters without court action, that plaintiff's non-disclosure and response was not substantially justified, nor was plaintiff's counsel's action in unilaterally rescheduling the Smith deposition, and that other circumstances do not exist to make an award of expenses unjust.

The CMS, Remillard and Spriggs defendants have filed a Memorandum and Statement Supporting Amount Sought in Sanctions. (Doc. 46). The County Defendants have also filed a similar Memorandum, Statement and Affidavit Supporting Amount Sought as Sanctions. (Doc. 50). Plaintiff has filed a responsive Memorandum to each of these papers. (Docs. 52, 53). The CMS Defendants have filed a Reply (Doc. 55) and a Motion to Strike (Doc. 56). The County Defendants have filed a Reply. (Doc. 72).

The Memorandum of Defendants CMS, Remillard and Spriggs (Doc. 46) sets out a claim in the total amount of $2928.00, which is calculated on the basis of 14.3 hours of work from July 12, 1996 through July 22, 1996 as follows:

Brian E. Hurley	13.90 hrs. at $200=	2790.00
Kathy McGarvey Hidy	.40 hrs. at $140=	56.00
Total Fees:		$2836.00
Also included are:	Copying Costs	85.40
	Postage	6.60
	Total Expenses:	92.00
	Grant Total:	$2928.00

The affidavit of Brian E. Hurley provides a breakdown of the attorney's hours claims in this matter and identifies the character of the work performed. Mr. Hurley and Ms. Hidy are private practitioners.

The Memorandum of the County Defendants (Doc. 50) sets out their claim in the total amount of $1,690.50 which is calculated on the basis of 11.27 hours of work from July 15, 1996 through July 24, 1996 by attorney Philip L. Zorn, Jr., at $150.00 per hour. An affidavit of Mr Zorn is attached which provides a breakdown of the hours and character of the work performed. Mr. Zorn is an Assistant Prosecuting Attorney for Hamilton County, Ohio.

Plaintiff's responses (Doc. 52 and 53) set forth objections to the Court's order of sanctions and award of attorney's fees and to the amounts claimed by defendants' counsel, respectively. It is argued that plaintiff's counsel was denied due process because she didn't have adequate time to prepare a defense; that the time claimed by Attorney Hurley is exaggerated; that the dependants; motions are duplicative; that the hourly rate claimed by Attorney Hurley is excessive; that the time claimed by Attorney Zorn is exaggerated and that the hourly rate claimed by Attorney Zorn is excessive.

Having carefully considered the matters now before the Court and the papers filed with regard thereto, it is the opinion and finding of the undersigned that the defendants are entitled to recover forthwith the amounts, with certain adjustments, claimed by them as reasonable expenses including attorney's fees incurred in relation to the motions brought before the Court on July 19, 1996. Further, the Court finds that the objections relied upon by plaintiff in the responses (Doc. 52, 53) are not well taken and do not provide a basis for relief from the sanctions ordered by the Court. As just indicated, however, certain adjustments will be made in relation to the amounts claimed.

The July 19th hearing was not a contempt hearing and plaintiff's counsel was not found to be guilty of contempt. The defendants' motions for protective order were heard pursuant to Rule 26(c), F.R. Civ. P. and the sanctions were imposed pursuant to Rule 37(a)(4), F.R. Civ. P. Plaintiff's counsel appeared at the hearing and presented her argument on all the motions. She neither stated to the Court that she was not prepared to go forward with the hearing nor requested a continuance of the hearing. Her position on each of the motions was

argued forcefully and clearly. This Court is not persuaded that she needed more time to prepare.

The schedule of hours submitted by counsel for the CMS, Remillard and Spriggs defendants (Doc. 46, p.2) will be revised by the Court to eliminate the first two items dated July 12, 1996 and July 15, 1996, respectively. The activity described therein would appear to have been necessary in the ordinary course of reviewing the discovery matters then under consideration. The .40 hours and 2.20 hours assigned to these items will be redacted from the schedule. In all other respects the schedule is approved. The total number of hours for which payment is to be made is 11.70 hours. The hourly rate of $200.00 for Mr. Hurley appears reasonable and will be allowed. Accordingly, the amount of payment to be made to counsel for these defendants attorney's fees is $2,340.00. The expenses in the amount of $92.00 are allowed, making a total payment of $2,432.00.

Also, the schedule of hours submitted by counsel for the County defendants (Doc. 50, pp. 6-7) will be revised by the Court to eliminate those items listed under the date of July 15, 19965. That activity would likewise appear to have been necessary under the existing circumstances. The total of 1.31 hours assigned to these items will be redacted from the schedule. In all other respects the schedule is approved. The total amount of hours for which payment is to be made is 9.96 hours. The hourly rate of $150.00 for Mr. Zorn appears reasonable and will be allowed. The total amount of payment to be made as attorney's fees for the County Defendants is $1,494.00.

The argument of plaintiff's counsel that the services of counsel for the defendants, respectively, are duplicative is misplaced. There are two distinct sets of defendants, each represented by separate attorneys. Each of those attorneys was entitled to proceed in such manner as would best represent his defendants with respect to the serious discovery dispute that had developed. Each of these attorneys did, it is not surprising, proceeding a similar manner pursuant to the Federal Rules of Civil Procedure. That they filed similar motions on similar grounds is not surprising either, and does not, in the opinion of the Court, constitute duplication of work for which compensation should not be made. Inasmuch as the conduct of plaintiff's counsel created the dilemma with which the defendants' attorneys were faced, it is not a detraction from their work effort that

they may have conferred in relation to the course of action to be taken.

Plaintiff's counsel requests a stay of this order pending an appeal. That request will be denied. The Court considers the conduct of plaintiff's counsel to be egregious.

Accordingly, It Is Ordered that:

Plaintiff's counsel forthwith pay to Crabbe, Borwn, Potts & Schmidt, Cincinnati, Ohio, counsel for defendants Correctional Medical Systems, Inc., Remillard and Spriggs, the sum of $2,432.00 as costs and attorney's fees in relation to the hearing before this Court on July 19, 1996 (Doc. 37) and the order entered on July 22, 1996. (Doc 38).

Plaintiff's counsel forthwith pay to the Treasurer, Hamilton County, Ohio, the sum of $1,494.00, representing costs and attorney's fees incurred by the Office of the Prosecuting Attorney, Hamilton County, Ohio, as counsel for the County Defendants herein in relation to the hearing before this Court on July 19, 1996 (Doc. 37) and the order entered on July 22, 1996. (Doc. 38).

The request of plaintiff's counsel for a stay of this order pending appeal is

DENIED.

Date:_____ _____

James F. Cook

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Kathy Brown,	)	
Plaintiff,	)	
	)	Case No. C-1-95-815
vs.	)	
Correctional Medical Systems,	)	
Inc., et al.,	)	
Defendant.	)	

ORDER

This matter, which has already consumed an inordinate amount of the Court's time, is now before the Court upon a number of motions, appeals from orders of the Magistrate Judge, and requests for sanctions. The Court will dispose of each motion, appeal, and request in this Order to the extent that it is fully briefed.

1. Appeals from Orders of Magistrate Judge Cook

For several months, ending on September 30, 1996, visiting United States Magistrate Judge James Cook monitored this litigation and ruled on discovery related motions. That task assumed the qualities of a full time occupation as the parties filed documents at a frenzied pace. Predictably, Plaintiff has appealed several of the Magistrate Judge's rulings.

Each of the orders from which Plaintiff appeals addresses a nondispositive, discovery-related issue. This court may only reverse an order of a magistrate judge in a discovery matter upon a finding that the order is clearly erroneous or contrary to law. 28 U.S.C. §636(b)(1)(A); Fed. R. Civ. P. 72(a).

a. Sanctions against Teresa Cunningham

Pursuant to an Order dated July 19, 1996, Magistrate Judge Cook concluded that Plaintiff's counsel, Teresa Cunningham, had failed to comply with requests for discovery and that her conduct

had necessitated intervention by the Court in the discovery process. The Magistrate Judge set the amount of the sanctions based upon submissions by Defendants' counsel regarding their fees and expenses in preparing the motions to compel discovery. Plaintiff appeals from the July 19 and the September 25 Orders.

Ms. Cunningham's conduct clearly necessitated the motions to compel resulting in the Magistrate Judge's Order compelling responses to interrogatories and requests for production. Accordingly, sanctions were mandated, pursuant to Rule 37(a)(4)(A), which is, essentially, self-executing in the event that a motion to compel is granted. The Magistrate Judge did not err in concluding that sanctions were appropriate.

The Magistrate Judge awarded sanctions in the amount of attorney's fees and expenses related to the motions to compel. Rule 37(a)(4)(A) specifically provides for sanctions in that amount. Accordingly, the amount of the Magistrate Judge's award was not contrary to law.

Ms. Cunningham argues that the Magistrate Judge erred by permitting inflated fees and permitting both groups of Defendants to recoup fees for similar activities. The Court does not find the award to be clearly erroneous on those grounds. Ms. Cunningham has not established that the Magistrate Judge's assessment that the requested fees were reasonable is clearly erroneous or contrary to law. Ms. Cunningham has also failed to establish that the two groups of Defendants, who have separate interests in t is litigation and are represented by separate counsel, should not recoup attorney's fees and expenses to the extent that the work performed for each group was similar. Obviously, each group of Defendants was required to act in its own interests in light of Plaintiff's failure to respond to discovery requests. By failing to respond, Ms. Cunningham assumed the risk that both groups of Defendants would incur fees and expenses in petitioning the court to compel discovery. The Magistrate Judge's Orders (Docs. 54 and 110) are hereby AFFIRMED.

b. Expert Witnesses

By Order dated September 5, 1996, Magistrate Judge Cook ruled that Harvey Rosen would not be permitted to testify as an expert witness in Plaintiff's behalf. The Magistrate Judge observed that the expert disclosure deadline had been extended and that Plaintiff had disclosed Mr. Rosen as a witness during the extended period. The Magistrate Judge further observed, however, that the deadline had been extended only for the purpose of permitting Plaintiff to identify a corrections expert to replace a previously disqualified expert. Concluding that Plaintiff was well aware that the deadline had not been extended for other purposes, the Magistrate Judge excluded Mr. Rosen, who is an economist.

Plaintiff was not entitled to disclose expert after the deadline for doing so. Plaintiff had not disclosed an expert economist as of that deadline. The Magistrate Judge extended the d3eadline, but in his September 5 Order he set forth his finding that Plaintiff knew that the purpose of the extension was only to permit the identification of a corrections expert. Obviously, if the extension was thus restricted, Plaintiff cannot argue that other experts could properly be disclosed during the extended period. In any event, Plaintiff has not demonstrated that the September 5 Order was clearly erroneous or contrary to law, and the Order is hereby AFFIRMED.

Plaintiff also appeals from the Magistrate Judge's September 30, 1996 Order pursuant to which he denied Plaintiff's motion to extend the deadline for identifying expert witnesses. The decision whether to extend such a deadline, particularly when the discovery deadline in the case has passed, is within the discretion of the Magistrate Judge's failure to extend the deadline in this case was clearly erroneous or contrary to law. Accordingly, the Magistrate Judge's September 30 Order is hereby AFFIRMED.

c. The Spriggs Memorandum

Shortly before the suicide death of Casey Starcher, Plaintiff's counsel, Teresa Cunningham, and Defendant Joseph Spriggs, an employee of Defendant Correctional Medical Systems, Inc., spoke to one another by telephone concerning Mr. Starcher. Within days after Mr. Starcher's death, Defendant Spriggs drafted a memorandum to his supervisor, Jean Jones, concerning his conversation with Ms. Cunningham.

Plaintiff moved to compel production of the Spriggs memorandum. Magistrate Judge Cook denied the motion on the ground that the document was prepared in anticipation of litigation and Plaintiff had failed to demonstrate that the requirements of Rule 26(b)(3) of the Federal Rules of Civil Procedure were satisfied with respect to the memorandum.

Plaintiff appeals on three grounds. First, Plaintiff contends that the Magistrate Judge erred in concluding that the memorandum was prepared in anticipation of litigation. Second, Plaintiff contends that substantial need has been demonstrated, contrary to the Magistrate Judge's finding. Third, Plaintiff contends that Plaintiff cannot obtain the substantial equivalent of the memorandum without undue hardship.

Magistrate Judge concluded, based upon the affidavits in the record concerning the circumstance in which Defendant Spriggs drafted the memorandum, that the memorandum was prepared in anticipation of litigation. That conclusion is supported by evidence in the record, and the Court does not conclude that it was clearly erroneous or contrary to law.

Pursuant to Rule 26(b)(3), the Court may only compel the production of the memorandum upon a showing by Plaintiff of substantial need and an inability to obtain the substantial equivalent of the memorandum without undue hardship. The Magistrate Judge found that Plaintiff did not make such a showing. The Court concludes that that finding was neither clearly erroneous nor contrary to law.

Plaintiff alleges that Teresa Cunningham informed Defendant Spriggs, during the telephone conversation in question, that Casey Starcher was suicidal and that recent developments in his state criminal case made a suicide watch particularly appropriate. Defendant Spriggs denied that Ms. Cunningham provided such information during their telephone conversation.

Plaintiff has had the opportunity to depose Defendant Sprigs concerning his recollection of the telephone conversation. The evidence in the record indicates that the memorandum also contains Defendant Spriggs recollection of the telephone conversation. Accordingly, Plaintiff has had the opportunity to obtain the substantial equivalent of the memorandum without undue hardship and has not demonstrated a substantial need

for the memorandum. The Magistrate Judge's Order of September 5, 1996 is, therefore, AFFIRMED.

2. Motions Concerning Teresa Cunningham as Counsel

As the Court has observed, Plaintiff alleges that Teresa Cunningham informed Defendant Spriggs in a telephone conversation shortly before Casey Starcher's suicide that Mr. Starcher was suicidal and that recent events made a suicide watch advisable. Defendant Spriggs has denied that Ms. Cunningham provided that information during the telephone conversation. Defendants have moved to disqualify Ms. Cunningham as counsel for Plaintiff in light of the likelihood that she will be called as witness for Plaintiff. Ms. Cunningham has opposed the motions, has moved to strike one of the motions, and has refused to inform the Court whether she intends to testify, even when the Court has explicitly ordered her to do so. Ms. Cunningham has also moved for a protective order and to quash Defendant's subpoena duces tecum.

Plaintiff has not identified a viable alternative to Ms. Cunningham's testimony. Ms. Cunningham is the only witness to the telephone conversation in question other than Defendant Spriggs who denies Plaintiff's allegations concerning the content of the conversation. Without engaging in a thorough analysis of Plaintiff's claims, the Court believes that the allegations concerning the contents of the conversation are essential to some or all of Plaintiff's claims. Accordingly, if Plaintiff intends to prove those claims, Ms. Cunningham will be required to testify to her recollection of the telephone conversation with Defendant Spriggs.

Disciplinary Rule 5-101 of the Code of Professional Responsibility, which is binding upon Ms. Cunningham as a member of the Ohio bar, provides, in pertinent part, as follows:

> (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
>
> (1) If the testimony will relate solely to an uncontested matter.
>
> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe

> that substantial evidence will be offered in opposition to the testimony.
>
> (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
>
> (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Disciplinary Rule 5-102 provides, in pertinent part, as follows:

> (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-1`01 (B)(1) through (4).

Ethical Consideration 5-9 elaborates upon the potential conflict created when an attorney acts as both witness and counsel:

> Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he become more easily impeachable for interest and thus may be less a effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes an witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the case of another, while that of a witness is to state facts objectively.

Ethical Consideration 5-10 explains that "doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate."

This Court recognized that motions to disqualify counsel should be considered with extreme caution, in view of the litigant's interest in retaining counsel of the litigant's choice and the danger that an opposing party may use a motion to disqualify to obtain a tactical advantage. See Paretti v. Cavalier Label Co., Inc., 722 F. Supp. 985 (S.D. N.Y. 1989); see also Evans v. Artek Systems Corp., 715 F.2d 788, 791-92 (2d Cir. 1983). The Court also recognizes that care must be taken before disqualifying an attorney since interlocutory appeals are generally unavailable from such orders. See Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985); In re Mechem, 880 F.2d 872 (6th Cir. 1989). Nevertheless, neither the United States Court or Appeals for the Sixth Circuit nor the Supreme Court of Ohio has hesitated to rule that an attorney whose testimony would cause a conflict under DR 5-101(B) or DR 5-102 must either voluntarily withdraw from the case or face disqualification. General Mill Supply Co. v. SCA Services, Inc., 697 F.2d 704 (6th Cir. 1982); Mentor Lagoons, Ionc. V. RubinU, 31 Ohio St.3d 256, 260 (1987).

In this case, the Court concludes that Teresa Cunningham cannot continue as counsel for Plaintiff in light of her role as witness. The Court recognizes that Ms. Cunningham has not conceded that she will testify. As the Court has observed, however, Plaintiff has not identified a means of proving the alleged version of the telephone conversation other than by Ms. Cunningham's testimony. Accordingly, it is "obvious", for purposes of the Disciplinary Rules, that Ms. Cunningham ought to be called as a witness, and the Court ascribes no credibility to her equivocation concerning her intentions. Defendants' motions to disqualify Ms. Cunningham as counsel for Plaintiff (Docs. 63 and 88) are, therefore, GRANTED. Plaintiff's motion to strike Correctional Medical Systems' motion to disqualify (Doc. 67) is DENIED.

Ms. Cunningham has submitted a motion for a protective order, to quash a subpoena issued by Defendants, and for sanctions (Doc. 106) related to attempts by counsel for Defendants to depose her. Ms. Cunningham's arguments in support of that motion are based upon her previous status as counsel for Plaintiff. Because she is no

longer Plaintiff's counsel, the issues raised by her motions are predominately moot. Defendants may depose her, and she is obligated to respond to the extent that she may do so without disclosing privileged information. Her motions related to Defendants' attempts at discovery (Doc. 106) are hereby DENIED.

3. Conclusion

The Order of visiting United States Magistrate Judge James Cook dated July 19, September 5, September 25, and September 30, 1996 (Docs. 38, 85 86, 99, and 105) are hereby AFFIRMED. Defendants' motions to disqualify Teresa Cunningham as counsel for Plaintiff (Docs. 63 and 88) are hereby GRANTED. Plaintiff's motion to strike Correctional Medical Systems' motion to disqualify Ms. Cunningham (Doc. 67) is hereby DENIED. Ms. Cunningham's motion for protective order, to quash, and for sanctions (Doc. 106) are hereby DENIED. The motions of Hamilton County and Correctional Medical Systems for sanctions (Doc. 73 and 74) are hereby DENIED.

Defendants may take the deposition of Teresa Cunningham on or before October 31, 1996. Ms. Cunningham is DIRECTED to attended a deposition scheduled by Defendants, and Defendants are INSTRUCTED to consult with Ms. Cunningham in order to identify a mutually agreeable time and date for the deposition. Ms. Cunningham is ADVISED to respond to questions posed to her at such a deposition unless she is unable to do so in light of the attorney-client privilege. Counsel for Defendants may contact the Court in the event that difficulties arise in the scheduling or execution of Ms. Cunningham's deposition.

Dispositive motions may be filed on or before November 4, 1996. Opposing memoranda must be filed and served, via hand delivery or facsimile, on or before November 19, 1996. Reply memoranda must be filed and served, via hand delivery or facsimile, on or before November 29, 1996. The Court will conduct the final

pretrial conference in this matter as scheduled on December 13, 1996.

IT IS SO ORDERED.

Sandra S. Beckwith
United States District Judge

No. 96-4250

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DARWIN LEE STARCHER, Plaintiff, TERESA CUNNINGHAM, Attorney-Appellant, v. MEDICAL CORRECTIONS SYSTEMS, INC.; HAMILTON COUNTY, OHIO; SIMON LEIS, Sheriff; SALLY REMILARD; Administrator of Correctional Medical Systems; JOSEPH STRIGGS, Employee of Correctional Medical Systems, Defendants-Appellees.	)	ORDER

Before: MERRITT, CONTIE, and BOGGS, Circuit Judges.

The plaintiff's attorney appeals from an interlocutory order imposing sanctions under Rule 11, Fed. R. Civ. P. The defendants move to dismiss the appeal for lack of a final, appealable order. The appellant-attorney opposes the motion to dismiss and requests sanctions be imposed against the defendants for filing the motion to dismiss.

There is a split among the Circuit Courts of Appeals as to whether in interlocutory award of Rule 11 sanctions against a party's attorney is immediately appealable. *Compare Appeal of Lict & Semonoff*, 796 F.2d 564 (1st Cir. 1986); *Eastern Maico Distributors, Inc. v. Maico-Fahzeugfabrik*, 658 F.2d 944 (3d Cir. 1981); *Click v. Abilene National Bank*, 822 F.2d 544 (5th Cir. 1987); *Howard v. Mail-Well Envelope Co.*, 90 F. 3d 433 (10th Cir.), *cert. Denied*, 117 S.Ct. 484 (1996); *G.J.B. & Assoc. v. Singleton*, 913 F.2d 824 (10th Cir. 1990); *Sanders Associates, Inc. v.*

Summagraphics Corp., 2 F.3d 394 (Fed. Cir. 1993); with *Morley v. Ciba-Geigy Corp.*, 66 F.3d 21 (2d Cir. 1995); *Sanko S.S. Co. v. Galin*, 835 F.2d 51 (2d Cir. 1987); *Frazier v. Cast*, 771 F.2d 259 (7th Cir. 1985); *Crookham v. Crookham*, 914 F.2d 1027 (8th Cir. 1990); *Aetna Life Ins. Co. f. Alla Medical Services, Inc.*, 855 F.2d 1470 (9th Cir. 1988); *Transamerica Commercial Fin. Corp. v. Banton, Inc.* 970 F.2d 810 (11th Cir. 1992). In light of this split, the panel assigned to hear this appeal on the merits should consider the jurisdictional issue raised.

It therefore is ORDERED that the motion to dismiss is denied at this time. The appellants' request for sanctions is also denied. The parties are directed to address the court's jurisdiction in their appellate briefs.

ENTERED BY ORDER OF THE COURT

_____

Clerk

DARWIN LEE STARCHER and KATHY BROWN, Plaintiffs, TERESA CUNNINGHAM, Attorney-Appellant, v. CORRECTIONAL MEDICAL SYSTEMS, INC.; HAMILTON COUNTY, OHIO; SIMON LEIS, individually and in his capacity as Sheriff; SALLY REMILARD; and JOSEPH SPRIGGS, Defendants-Appellees.

No. 96-4250

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

May 21, 1998, Filed

COUNSEL: ARGUED: Teresa L. Cunningham, Cincinnati, Ohio, for Appellant.

ARGUED: Philip L. Zorn, Jr., HAMILTON COUNTY PROSECUTOR'S OFFICE, Cincinnati, Ohio, for Appellees.

JUDGES: Before: BOGGS, MOORE, and FARRIS,* Circuit Judges. BOGGS, J., delivered the opinion of the court, in which FARRIS, J., joined. MOORE, J., delivered a separate dissenting opinion.

* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

DARWIN LEE STARCHER and KATHY BROWN, Plaintiffs, TERESA CUNNINGHAM, Attorney-Appellant, v. CORRECTIONAL MEDICAL SYSTEMS, INC.; HAMILTON COUNTY, OHIO; SIMON LEIS, individually and in his capacity as Sheriff; SALLY REMILARD; and JOSEPH SPRIGGS, Defendants-Appellees.

No. 96-4250

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

May 21, 1998, Filed

COUNSEL: ARGUED: Teresa L. Cunningham, Cincinnati, Ohio, for Appellant.

ARGUED: Philip L. Zorn, Jr., HAMILTON COUNTY PROSECUTOR'S OFFICE, Cincinnati, Ohio, for Appellees.

JUDGES: Before: BOGGS, MOORE, and FARRIS,* Circuit Judges. BOGGS, J., delivered the opinion of the court, in which FARRIS, J., joined. MOORE, J., delivered a separate dissenting opinion.

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* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

BOGGS, Circuit Judge.

Attorney Teresa Cunningham's appeal requires us to opine on an issue that has divided our sister circuits: whether an attorney who eventually withdraws or is disqualified from a case may take an immediate, interlocutory appeal from an order in that case levying attorney's fees and costs against her for discovery violations. We believe the better view to be that an attorney in these circumstances may not take an immediate appeal, but rather must wait to file an appeal until final judgment is entered in the case. Because we lack jurisdiction to entertain this interlocutory appeal, we cannot disturb the order assessing attorney's fees and costs against Cunningham.

I

On September 19, 1995, Cunningham (a sole practitioner) filed suit under 42 U.S.C. § 1983 against defendants Correctional Medical Systems, Inc. ("CMS"), two CMS employees, Hamilton County, Ohio, and the Hamilton County sheriff. The complaint Cunningham filed on behalf of plaintiff Darwin Lee Starcher alleged that the defendants negligently failed to supervise Starcher's son Casey, despite his known history of suicide attempts, and thus violated Casey's constitutional rights. Casey committed suicide while incarcerated in the Hamilton County jail.

In March 1996, the magistrate judge assigned to the case entered a scheduling order. The scheduling order required that the plaintiff designate experts by June 7, 1996, and that the defendants designate experts by July 19, 1996. It also set a discovery cut-off date of September 16, 1996, and a deadline of October 16, 1996, for filing dispositive motions. Cunningham's representation was fraught was difficulties even from the earliest days of this litigation. To begin with, it was apparent early in the case that Cunningham might be a material witness in the case because she spoke to a CMS official about Casey Starcher's psychiatric condition just a few days before Casey's suicide. For that reason, on four separate occasions the defendants moved to disqualify Cunningham as counsel. The magistrate judge denied the first three of these motions.

While she was opposing these motions to disqualify, Cunningham also managed to get into serious discovery trouble. The

on July 25, as ordered by the court.[1] Nonetheless, Cunningham refused to withdraw her deposition notice and the defendants resorted to filing a motion for protective order. Simultaneously, the defendants moved for an award of the attorney's fees they incurred in seeking court intervention to force Cunningham to comply with the earlier discovery order.

The magistrate judge scheduled a hearing for July 19, 1996. Cunningham attended this hearing, along with counsel for all defendants. At the hearing, Cunningham argued that she should be excused for failing to comply with her discovery obligations both because the defendants had served "contention" interrogatories,[2] the answers to which allegedly depended on documents to be produced by the defendants, and because her client had died and the new administrator of the Starcher estate was not returning her telephone calls. The only reason Cunningham gave for noticing a deposition on a date different from the date previously ordered was that defense counsel would not consent to a change in the time and location of the deposition. Significantly (as explained below), Cunningham did not ask for additional time to prepare a defense to the motion for fees and costs, nor did she object to the timing of the hearing.

After hearing from all counsel, the magistrate judge ruled for the defendants on all issues. In particular, he issued a new order requiring Cunningham to supplement her discovery responses with full and complete responses within 10 days, he granted the defendants' motion for a protective order quashing the notice of depositions of the two defendants until Cunningham's discovery responses were received, and he granted defendants' motions for fees and costs, instructing defense counsel to file a bill of costs. The magistrate judge then received memoranda from the parties concerning the propriety of the fee award against Cunningham. In her memorandum, Cunningham argued (1) that the defendants' motions for fees and costs were received only shortly before the hearing before the magistrate judge, (2) that the magistrate judge's

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[1] Cunningham testified that the reason she did not contact defense counsel to work out a compromise was that she "knew from prior experience from working with them that it wouldn't do any good; it would be a waste of time."

[2] "Contention" interrogatories are interrogatories that seek to clarify the basis for or scope of an adversary's legal claims. The general view is that contention interrogatories are a perfectly permissible form of discovery, to which a response ordinarily would be required. *See, e.g., Taylor v. FDIC*, 132 F.3d 753, 762 (D.C. Cir. 1997); *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir. 1997).

original July 10, 1996, order, requiring discovery responses by July 12th, gave her only two days within which to respond to discovery (despite the fact that she actually had the entire period from May 29th through July 12th to file responses), and (3) that the amount of requested attorney's fees was too high.

The magistrate judge rejected these arguments. He noted that the July 19th hearing had been scheduled on short notice "in view of the apparent urgency of these motions." He also stated that "all counsel were present and were given the opportunity to argue the various matters raised by the motions. A written transcript of the hearing has been prepared and filed in the record." The magistrate judge then stated that:

> The authority for the [fees and costs imposed] by the Court is found in Rule 26(c), F.R. Civ. P., and Rule 37(a)(4), F.R. Civ. P. The defendants' motion for protective orders were granted after a hearing was conducted; it was determined that the conduct of plaintiff's counsel had necessitated the motions; it is apparent from the motions and the record of the hearing that defendants [sic] counsel made a good faith effort to resolve the matters without court action, that plaintiff's non-disclosure and response was not substantially justified, nor was plaintiff's counsel's action in unilaterally rescheduling the Smith deposition, and that other circumstances do not exist to make an award of expenses unjust.

With these findings in mind, the magistrate judge ordered Cunningham to pay $2928.00 in attorney's fees, copying costs, and postage to CMS, and $1690.50 in attorney's fees to the county defendants. The magistrate judge further noted that Cunningham "neither stated to the Court that she was not prepared to go forward with the hearing nor requested a continuance of the hearing. Her position on each of the motions was argued forcefully and clearly. This Court is not persuaded that she needed more time to prepare." In closing, the magistrate judge stated that "the Court considers the conduct of plaintiff's counsel to be egregious." Over Cunningham's objections, the district court affirmed the magistrate judge's award of fees and costs. Simultaneously, the district court granted the defendant's motion to disqualify Cunningham as plaintiff's counsel. This appeal followed.

II

A

The final judgment rule, reflected in 28 U.S.C. § 1291, has deep roots in American law. *See Cobbledick v. United States*, 309 U.S. 323, 326 (1940) (noting origin of final judgment rule in Judiciary Act of 1789). Both to ensure the integrity of the trial process and to improve the efficiency of the judicial system, the final judgment rule essentially provides that interlocutory orders entered by a trial court -- such as discovery orders entered during pretrial proceedings, or evidentiary rulings made during trial -- may not be reviewed by an appellate court until the trial court enters a final judgment disposing of all claims at issue in the case.[3] More than 90 years ago, a unanimous Supreme Court held that an order compelling the production of discovery materials is a non-appealable interlocutory order. *See Alexander v. United States*, 201 U.S. 117 (1906). In *Alexander*, the Supreme Court recognized that "in a certain sense finality can be asserted" as to such orders, but only in the same sense that "finality can be asserted of any order of a court." *Id.* at 121. The Court therefore laid down a general rule governing the appealability of discovery orders: an individual subject to a discovery order can either obey the order, or can refuse to comply and face punishment for contempt. Because a contempt judgment is personal to the individual resisting the discovery order, and is considered final as to that individual, an immediate appeal is available. *See id.* at 122. In Alexander, however, rather than openly resist a discovery order, the appellants simply appealed the order.

[3] The principal exceptions to the final judgment rule are, first, Fed. R. Civ. P. 54(b), which permits a trial court to direct the entry of a "final judgment" in a case even though that judgment will not dispose of all claims (or will dispose of all claims, but not as to all parties) in the case; second, 28 U.S.C. § 1292(b), which permits an appeal from an interlocutory order if the trial court certifies that the order raises a controlling question of law as to which there is substantial ground for difference of opinion, and if the appellate court exercises its discretion to hear the appeal; and third, the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp*., 337 U.S. 541 (1949), which permits the interlocutory review of certain collateral orders that conclusively determine a disputed question, that resolve an important issue, and that would be effectively unreviewable on appeal from a final judgment.

The Supreme Court dismissed the appeal for want of jurisdiction because there was no final judgment as to the appellants. *See ibid.*

Alexander remains the general rule governing appeals from discovery orders.[4] However, the Supreme Court has carved out an exception for a "small class" of discovery and other interlocutory orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Co.*, 337 U.S. 541, 546 (1949). Our task today is to decide whether an order requiring the plaintiff's attorney to pay to defense counsel the costs incurred as a result of moving to compel discovery qualifies as a member of the "small class" of immediately appealable collateral orders contemplated in *Cohen*.

In addressing this question, two prefatory comments are required. First, while we are sympathetic to the plight of Ms. Cunningham, who may, as a practical matter at this late date, have no avenue for appellate review other than this proceeding,[5] the mere fact that she may be unable to obtain appellate review does not enter into our jurisdictional analysis. As the unanimous Supreme Court has said, "the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice. Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration." *Cobbledick*, 309 U.S. at 325. Second, our subjective assessment of the importance, if any, of the underlying issues raised by Cunningham's appeal also cannot enter into our analysis. The Supreme Court has declined to extend the collateral-order doctrine to cover appeals from judgments of even the most sweeping import. *See, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69 (1978) (holding class-certification order not appealable under *Cohen*); *cf. In re Rhone-Poulenc Rorer, Inc.*, 51

[4] The Supreme Court's adherence to the Alexander procedure for obtaining appellate review of discovery orders has been unswerving. *See Church of Scientology of California v. United States*, 506 U.S. 9, 18 n.11 (1992); *United States v. Ryan*, 402 U.S. 530 (1971).

[5] The underlying case has been dismissed by the district court since this appeal was filed, and Cunningham did not file a notice of appeal from the order dismissing the case.

F.3d 1293, 1295 (7th Cir. 1995) (recognizing broad significance of class-certification orders and noting that writ of mandamus was required to obtain appellate review of such an order).

B

The precise question presented today is whether Cunningham, an attorney representing the plaintiff who was disqualified as counsel during the course of the litigation below, has a right to an immediate appeal from an order imposing attorney's fees and costs on her because her opponents were forced to move for an order compelling her to comply with a previous discovery order. To qualify as an immediately appealable collateral order under *Cohen*, this order would have to conclusively determine the disputed question (here, Cunningham's liability for attorney's fees and costs), resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal. It is beyond dispute that the first *Cohen* factor is satisfied here; accordingly, we focus our attention on factors two and three.

The circuits have divided over the question of whether a discovery order directed at an attorney participating in the underlying lawsuit raise issues "completely separate from the merits of the action."[6] Five circuits have held that orders similar to the order at issue in this case (including orders imposing sanctions under Fed. R. Civ. P. 11, orders assessing attorney's fees under Fed. R. Civ. P. 37, and others) are so completely separate from the merits of the underlying action as to be immediately appealable by the attorney subject to the order. *See Transamerica Commercial Fin. Corp. v. Banton, Inc.*, 970 F.2d 810, 814 (11th Cir. 1992); *Crookham v. Crookham*, 914 F.2d 1027, 1029 n.4 (8th Cir. 1990); *Aetna Life Ins. Co. v. Alla Med. Svcs, Inc.*, 855 F.2d 1470, 1472-73 (9th Cir. 1988); *Frazier v. Cast*, 771 F.2d 259, 262 (7th Cir. 1985); *Cheng v. GAF Corp.*, 713 F.2d 886, 889 (2d Cir. 1983). Five other circuits have come to the opposite conclusion. *See Sanders Assocs., Inc. v.*

[6] We recognize, of course, that Cunningham was no longer participating in the case at the time she filed this appeal; she had been disqualified as counsel on the same day the district court affirmed the magistrate judge's order imposing attorney's fees and costs against her. We discuss the question of whether this distinction matters in Section II.C, *infra*.

Summagraphics Corp., 2 F.3d 394 (Fed. Cir. 1993); *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990); *Click v. Abilene Nat'l Bank*, 822 F.2d 544, 545 (5th Cir. 1987); *In re Licht & Semonoff*, 796 F.2d 564, 569-70 (1st Cir. 1986); *Eastern Maico Distribs. v. Maico-Fahrzeugfabrik, G.m.b.H.*, 658 F.2d 944, 947 (3d Cir. 1981).

Because our circuit has not yet stepped into these cross-currents, we are especially mindful of *Cohen*'s dictum that practical considerations are paramount in deciding whether a particular kind of order qualifies for immediate appeal under the collateral order doctrine. *See Cohen*, 337 U.S. at 546. In this regard, it is telling that even some of those circuits that initially embraced the idea that an attorney could immediately appeal an order imposing discovery sanctions have since recognized its significant potential for disruption of the trial process. The Second Circuit, for example, recently noted that its precedent permitting attorneys immediately to appeal sanctions orders led to a "flurry of arguments, charges and countercharges, motions and cross-motions and other papers in the district court" that "effectively diverted for far too long the attention of the parties and the district court from the merits of the underlying . . . litigation." *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 96 (2d Cir. 1997). In light of the practical effects of its precedent, the court went so far as to say that "were we writing on a clean slate, we would be tempted to confine *Cheng* to its unusual facts and characterize the sanctions order here as nonappealable under the *Cohen* doctrine." Ibid. Similarly, the Seventh Circuit recently acknowledged that its precedents permitting immediate appeals by sanctioned attorneys "have not played to universal acclaim," and noted that extension of these precedents "would produce a substantial, and unjustified, erosion of the final-decision requirement." *Cleveland Hair Clinic, Inc. v. Puig*, 104 F.3d 123, 125 (7th Cir. 1997).

In short, several circuits have experimented with the "immediate appeal" rule urged by Cunningham, and the experience has not been positive. We therefore are not persuaded that the issues presented by an appeal such as Cunningham's reliably could be deemed completely separate from the merits of the underlying case. It is conceivable, of course, that in an extreme case where an attorney provides absolutely no response to discovery, the issue of the attorney's compliance with a discovery order would not implicate any merits issues. But here, Cunningham provided responses to at least some of the defendants' discovery requests, and presumably her

challenge to the district court's Rule 37 order would be that her responses were sufficient at the time they were provided. To resolve such a debate, we would be required to consider, among other things, the available evidentiary support for each of many specific contentions questioned by the defendants. This process would differ only slightly from an inquiry into the merits. We therefore conclude that the issues involved in Cunningham's appeal likely would not turn out to be "completely separate" from the merits of the underlying case.

C

Our dissenting colleague argues that the crucial fact entitling Cunningham to an immediate appeal is that she was disqualified as counsel in the underlying case and that, therefore, her appeal is lexically "separate" from the issues involved in the underlying case. *See infra* at 18-20. On this issue too, the circuits are split. Of the five circuits (First, Third, Fifth, Tenth, and Federal) that refuse to permit a participating attorney to file an immediate appeal under the collateral order doctrine, two have held nevertheless that an attorney who has withdrawn from representation in the underlying case is entitled to an immediate appeal. *See Walker v. City of Mesquite*, 129 F.3d 831, 832 (5th Cir. 1997); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 539 (3d Cir. 1985). By contrast, one of these circuits has specifically reached the opposite conclusion. *See Howard v. Mail-Well Envelope Co.*, 90 F.3d 433, 436 (10th Cir.), *cert. denied*, 117 S. Ct. 84 (1996).[7]

We believe the better view is that a non-participating attorney, like a participating attorney, ordinarily must wait until final disposition of the underlying case before filing an appeal. For one

[7] In addition, the D.C. Circuit recently held that a non-participating law firm was not entitled to an immediate appeal of a discovery order. *See In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998). While the law firm in that case was never involved in a representative capacity in the underlying case (it was instead the target of a civil subpoena), the fact that the firm was not deemed entitled to an immediate appeal provides strong further support for the proposition that the attorney's involvement or lack of involvement in the underlying case cannot be dispositive in determining whether the attorney is entitled to an immediate appeal. Surely if an attorney who was never involved in a case is not sufficiently "separate" from the case to warrant immediate appellate review, an attorney (like Cunningham) who was involved but subsequently is disqualified cannot be entitled to an immediate appeal.

thing, it would be strange if the fact of disqualification permitted an attorney to take an immediate appeal of a discovery order, but did not permit an immediate appeal of the disqualification order itself. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985) (order disqualifying counsel in civil case not immediately appealable under collateral order doctrine). Moreover, from a practical perspective, there are serious administrative problems with a rule that hinges on whether the attorney subject to the discovery order is a participating or non-participating attorney. Here, by sheer fortuity, it happens that the order affirming the magistrate judge's order that Cunningham pay attorney's fees was issued on the same day as the order disqualifying Cunningham from the case. We can easily conceive of cases where this does not happen -- where, for example, an attorney is ordered pursuant to Rule 37 to pay attorney's fees associated with a discovery dispute, and then does not withdraw or become disqualified as counsel for months or years afterward. In such a case, when would the 30-day filing period of Fed. R. App. P. 4 begin to run -- from the date of the Rule 37 order, or from the date of withdrawal? Either outcome strikes us as fraught with difficulty.

Expanding the collateral order doctrine to cover cases like Cunningham's seems particularly unwise at a time when requests for sanctions are increasingly used more for tactical purposes than to seek redress for true discovery abuses. Creating a distinction between participating and non-participating attorneys could add another tactical arrow to the arsenal; litigants confronted with especially skilled or tenacious counsel could move for sanctions in a calculated attempt to force the attorney to withdraw from the case. For all these reasons, we decline to adopt a distinction between participating and non-participating attorneys for purposes of the collateral order doctrine.

D

Because Cunningham's appeal does not satisfy the second element of the *Cohen* test, we need not address the third element -- whether the order would be effectively unreviewable absent an interlocutory appeal -- in any great detail. As on the other dimensions of this case, the circuits are divided fairly evenly between those that believe a sanctioned attorney satisfies the third *Cohen* factor and those that do not. This circuit split is somewhat

puzzling in light of the Supreme Court's recognition that orders awarding attorney fees are appealable independent of the disposition of the merits of the underlying case. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199-200 (1988). We see no reason why, after final resolution of the underlying case (whether the resolution be a judgment for plaintiff, a judgment for defendant, or an out-of-court settlement), a sanctioned attorney should be unable to appeal the order imposing sanctions. Of course, if the person involved is a non-participating attorney, this may require her to monitor the progress of the litigation with some care. This fact does not change our analysis of the third *Cohen* factor, however; it is important not to "improperly blur the line between the impossibility of effective review necessary under the *Cohen* doctrine and [the] mere inconvenience of monitoring the former client's case and performing the other tasks necessary to perfect an appeal." *Howard*, 90 F.3d at 437.

III

For the foregoing reasons, we conclude that we have no jurisdiction over Cunningham's appeal. Therefore, the appeal is DISMISSED.

KAREN NELSON MOORE, Circuit Judge, dissenting.

I write separately to highlight the unnecessarily broad brush the majority uses to paint on this otherwise narrow canvass. Specifically, I harbor grave concerns regarding three facets of the majority opinion. First, the majority holds that sanctions orders, such as the one appealed from in this case, fail to satisfy the second *Cohen* element requiring that the merits of the underlying litigation be separate from the sanctions order.[8] *See* Slip Op. at 9-12. Second, the majority rejects any distinction between those attorneys who are and those who are not participating in the underlying litigation, despite the weight of authority accepting this distinction. Finally, the majority ignores the inequity of applying its new rule, retroactively,

[8] In dictum, the majority notes that maybe in an "extreme case" the sanctions order "would not implicate any merits issues." Slip Op. at 12.

to bar a merits review of the issues raised by Cunningham in this appeal. *See* Slip Op. at 8, n.5.

In my view, Cunningham's appeal satisfies the second *Cohen* requirement in that the sanctions order is separate from the merits of the underlying action. Although in some instances sanctions orders may be intertwined with the merits, none of these circumstances are present in this case. For example, in *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990), the plaintiff's lawyer failed to turn over notes requested by the defendant's lawyer and then used those notes at trial. The district court sanctioned the plaintiff's lawyer for failing to produce the notes to defendant's counsel. On appeal, the Tenth Circuit held that the sanctions arose from a discovery dispute over the relevance of the notes. Accordingly, any evaluation of relevancy would necessarily require the court to examine the merits of the underlying action. The court thus concluded that the attorney's appeal failed to satisfy the *Cohen* requirements and should await a final judgment in the case. *Accord Eastern Maico Distribs. v. Maico-Fahrzeugfabrik, G.m.b.H.*, 658 F.2d 944, 947 (3d Cir. 1981) (dismissing appeal for failure to satisfy *Cohen* requirements where review of sanctioning of attorney for filing dilatory discovery motions required examination of relevance to underlying dispute). *Cf. Evanson v. Union Oil Co. of California*, 619 F.2d 72 (Temp. Emer. Ct. App.), *cert. denied*, 449 U.S. 832 (1980) (sanctioned party requested appellate court to vacate district court's sanction order for lying in interrogatory answers, and court of appeals refused where determining truth or falsity of answers would require it to evaluate the merits of the underlying action).

Contrast the holdings in the preceding cases with the holding in *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 882 F.2d 682 (2d Cir. 1989). In that case, the magistrate judge imposed monetary sanctions on an attorney under Rule 37 for failure to provide complete answers to interrogatories and for failure to produce requested documents, and the district court affirmed the sanctions order. On appeal, the Second Circuit concluded that the appeal satisfied the second *Cohen* requirement "since the imposition of the sanction involves an issue completely separate from the merits of the underlying litigation." *Id.* at 685 (quotation omitted).

The facts presented in Cunningham's appeal more closely resemble the facts in *Thomas E. Hoar, Inc.* than those facts presented in *G.J.B. & Assocs.*, *Eastern Maico Distribs.*, and *Evanson*. Specifically, unlike the appellants in those cases, Cunningham does

not contend that her failure to answer the discovery turned on the relevance or scope of the discovery, or that her answers were true where the district court found them to be false. Those kinds of contentions could have required this court to evaluate the merits of the underlying action to determine if the interrogatories were relevant, covered an appropriate time frame, or whether Cunningham's responses were in fact true. As the courts in *G.J.B. & Assocs.*, *Eastern Maico Distribs.*, and *Evanson* correctly concluded, any such evaluation of the merits would by its very nature run afoul of *Cohen*'s requirement that the sanctions order and the merits be "completely separate."

Cunningham raises far different challenges to the sanctions order. Her arguments against the sanctions order are that she did not have enough time to answer the interrogatories, she had to depose Smith in Indianapolis, and she did not receive sufficient notice in order to prepare for the sanctions hearing. None of these arguments against the sanctions order involve the substance of the discovery itself. Consequently, like the appellant's due process objection in *Thomas E. Hoar, Inc.*, resolution of Cunningham's timing and due process objections to the sanctions order would not compel us to address the merits of the underlying action. Therefore, Cunningham's appeal satisfies the second *Cohen* requirement. In my view, the majority opinion needlessly forecloses the possibility that some sanctions orders, not just those in an "extreme case," will not be intertwined with the merits and thus will satisfy the second *Cohen* requirement.

Next, the majority rejects the participating and non-participating attorney distinction. However, of the five circuits to consider this issue explicitly, four have found this distinction persuasive. *Compare Walker v. City of Mesquite, Tex.*, 129 F.3d 831, 832 (5th Cir. 1997) ("As a general rule an attorney must await the end of litigation in the district court to appeal a sanction . . . .However, we recognize[] an exception to this rule in those situations in which the sanctioned attorney is no longer involved in the case and an appeal of the sanctions order would not impede the underlying litigation."); *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 539 (3d Cir. 1985) (holding that a sanctioned attorney who has withdrawn from the representation may take an interlocutory appeal under *Cohen*); *Mark Indus., Ltd. v. Sea Captain's Choice, Inc.*, 50 F.3d 730, 731 (9th Cir. 1995) (sanctioned counsel who has withdrawn from the representation may take an

interlocutory appeal under *Cohen*); *Knorr Brake Corp. v. Harbil, Inc.*, 738 F.2d 223, 226 (7th Cir. 1984) (same), *with Howard v. Mail-Well Envelope Co.*, 90 F.3d 433, 436 (10th Cir. 1996) (rejecting interlocutory appeal of sanctions order by withdrawn attorney).

With respect to *In re Sealed Case*, 141 F.3d 337 (D.C. Cir. 1998), cited by the majority in a footnote, that case did not address the issue of whether a sanctioned attorney who has withdrawn or been disqualified from representing a party to the underlying action may immediately appeal the sanctions order. Instead, that case addressed the issue of whether a law firm subjected to a subpoena duces tecum relating to a case in another district court in which it was not a party could immediately appeal an order of a federal district court transferring the case to that other federal district court. The D.C. Circuit held the law firm could not immediately appeal such an order, but must either disobey the order, be cited for contempt, and then appeal the contempt order, or must file a petition for a writ of mandamus. *See id.* at *1. In that case, the law firm proceeded by way of a mandamus petition. Accordingly, the Sealed case, which focuses on a peripheral issue, provides little support for the Tenth Circuit's position in Howard denying an immediate appeal of the sanctions order to a sanctioned attorney who no longer represents a party in the underlying action, a position that is contrary to the weight of published authority.

The Tenth Circuit bases its restrictive position on the ground that a sanctioned attorney no longer connected to the underlying action may appeal at the conclusion of that action, whether the court issues a final judgment, or the parties settle the case. Thus, the Tenth Circuit holds the sanctioned attorney fails to meet the third *Cohen* requirement of demonstrating that the sanctions order will be effectively unreviewable on appeal from a final judgment. *See Howard*, 90 F.3d at 436-37. This is a debatable issue, as manifested by the even split among our sister circuits when the sanctioned attorney remains as an attorney in the underlying litigation. The Second, Seventh, Eighth, Ninth, and Eleventh Circuits hold that a sanctioned attorney meets this third requirement. *See, e.g., Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 95-96 (2d Cir.), *cert. denied*, 118 S. Ct. 337 (1997); *Serritella v. Markum*, 119 F.3d 506, 512 (7th Cir.), *cert. denied sub nom. Steagall v. United States Dist. Court of Cent. Dist. of Ill.*, 118 S. Ct. 566 (1997); *Crookham v. Crookham*, 914 F.2d 1027, 1029 n.4 (8th Cir. 1990); *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995);

Transamerica Commercial Fin. Corp. v. Banton, Inc., 970 F.2d 810, 814 (11th Cir. 1992). Conversely, the First, Third, Fifth, Tenth, and Federal Circuits hold that a sanctioned attorney who remains as counsel in the litigation fails the third *Cohen* requirement. *See, e.g., In re Licht & Semonoff*, 796 F.2d 564, 572 (1st Cir. 1986); *Eastern Maico Distribs. v. Maico-Fahrzeugfabrik, G.m.b.H.*, 658 F.2d 944, 947 (3d Cir. 1981); *Click v. Abilene Nat'l Bank*, 822 F.2d 544, 545 (5th Cir. 1987); *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824, 829 (10th Cir. 1990); *Sanders Assocs. v. Summagraphics Corp.*, 2 F.3d 394, 398 (Fed. Cir. 1993).

Today, the majority rejects the weight of authority, holding that a nonparticipating attorney, such as Cunningham, cannot take an interlocutory appeal of a sanctions order. Adopting the reasoning in Howard, the majority holds that in this circuit, a sanctioned attorney, whether participating or nonparticipating in the underlying action, must wait until the termination of that litigation to take an appeal of the sanctions order. In holding that adequate and effective appellate review is available at the conclusion of the case, the majority renders it impossible for nonparticipating sanctioned attorneys to satisfy the third *Cohen* requirement. Although I remain unpersuaded by the majority's view that nonparticipating attorneys must await the conclusion of the underlying action in order to appeal the sanctions order, I am bound by this new holding that review is both available and effective when delayed until the conclusion of a case in which the attorney no longer has a role.

Having announced a new rule in this circuit, the majority suggests that its holding applies retroactively so as to bar a merits review of the issues Cunningham raises in this appeal. *See* Slip Op. at 9 & n.5. Because Cunningham did not file a notice of appeal upon the termination of the underlying litigation, retroactive application of the majority decision effectively bars any review of the district court's sanctions imposed upon her. The inequity of this result is patently obvious. When faced with a similar situation, the Tenth Circuit in *G.J.B. & Assocs. v. Singleton*, 913 F.2d 824 (10th Cir. 1990), refused to impose such an unfair result on the attorney, explaining that

> the sharp split between the circuit courts as to the *Cohen* doctrine's applicability and the absence of any binding circuit precedent made our holding difficult, if not impossible, to foretell. Consequently, to apply our holding retroactively would be inequitable. . . . If we dismiss [the

> attorney's] appeal for want of jurisdiction, he will be remediless for the time has passed to file a new notice of appeal from the final judgment. While the aim of our holding--to effectuate the purposes of the final judgment rule--would not be hampered by its retroactive application, the small benefit we would gain by applying our holding retroactively does not outweigh the inequity which would result from such a determination. Accordingly, we conclude that our holding should not apply retroactively . . .

Id. at 829-30. As in *G.J.B.*, principles of equity militate here against retroactive application of the majority's new rule and compel this court to conduct a merits review of the issues Cunningham raises in this appeal.

For the foregoing reasons, I respectfully dissent.

DARWIN LEE STARCHER AND KATHY BROWN, Plaintiffs,
TERESA CUNNINGHAM, Attorney-Appellant, v.
CORRECTIONAL MEDICAL SYSTEMS, INC. ET AL.,
Defendants-Appellees.

96-4250

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

August 5, 1998

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and discussion of the case. Accordingly, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.